Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-371-91
ABDUL HAMID OMAR LP, EDGAR JOSEPH JR AND MOHAMED DZAIDDIN SCJJ
14 APRIL 1993

Legal Profession *— Professional discipline — Disciplinary proceedings against advocate and solicitor — Procedure — Time limits imposed — Whether mandatory or directory — Legal Profession Act 1976 ss 98 & 99*

Statutory Interpretation *— Object and intention of legislature*

The honorary secretary of the Bar Council had made a complaint against the respondent and his partner on 6 June 1987 for mismanagement of their firm's trust account. On 3 July 1987, the Bar Council referred the complaints to the state bar committee of Pahang which forwarded its report and recommendation to the Bar Council on 3 September 1987. Under s 98 of the Legal Profession Act 1976 ('the Act'), the Bar Council had only six weeks from the date of receipt of the report and recommendation of the state bar committee of Pahang to apply to the Chief Justice for the appointment of a disciplinary committee, so that the last day for doing so was 15 September 1987. The Bar Council however did not do so until 26 October 1987, thus being out of time by some 12 days. On an application by the respondent, the High Court decided that the provisions as to time in the Act were mandatory and that consequently on the facts, the appointment of the disciplinary committee was invalid, null and void. The appellants have appealed.

Held, dismissing the appeal:

(1) In construing a statutory provision what the court endeavours to do is to construe it according to the object and intent of Parliament. The courts cannot however ask Parliament what its intention is. They will have to decide that question for themselves from the words Parliament has used.

(2) On general principle, where a statute regulates the exercise of a right or power or the use of a prescribed procedure, express reference to time being made, there is a marked inclination of the court to regard the relevant provision as one which must be strictly and meticulously followed out. Sections 93–103 of the Act present a picture of a code of procedure in which time is given a place of paramount importance.

(3) In seeking Parliament's intention, the court will have to strike a balance between the risk of prejudice caused by any delay and the risk that a proper inquiry into a complaint will not be attained if the appointment of the disciplinary committee is held to be null

and void. It was submitted that the former was the greater evil. Therefore in this case, the time limits imposed by ss 98 and 99 of the Act were mandatory and non-compliance with these time limits rendered the proceedings under the Act against the respondent, including the appointment of the disciplinary committee, incurably illegal, void and of no effect.

[Bahasa Malaysia summary

Setiausaha kehormat Majlis Peguam telah membuat aduan terhadap penentang dan rakan kongsinya pada 6 Jun 1987 kerana salah pengurusan akaun amanah firma mereka. Pada 3 Julai 1987, Majlis Peguam telah merujukkan aduan itu kepada jawatankuasa peguam negeri Pahang yang telah menghantar laporan dan cadangan-cadangan mereka kepada Majlis Peguam pada 3 September 1987. Di bawah s 98 Akta Profesion Undang-Undang 1976 ('Akta itu'), Majlis Peguam hanya mempunyai enam minggu dari tarikh penerimaan laporan dan cadangan-cadangan jawatankuasa peguam negeri Pahang itu untuk memohon kepada Hakim Besar supaya jawatankuasa tatatertib dilantik, dan oleh itu hari yang terakhir untuk membuat demikian ialah 15 September 1987. Tetapi, Majlis Peguam tidak membuat demikian hingga pada 26 Oktober 1987, iaitu terlambat 12 hari. Atas permohonan yang dibuat oleh penentang, Mahkamah Tinggi telah memutuskan bahawa peruntukkan mengenai masa di dalam Akta itu adalah mandatori dan oleh itu atas fakta kes ini, perlantikan jawatankuasa tatatertib itu adalah batal dan tidak sah. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Apabila mentafsirkan suatu peruntukkan statutori apa yang mahkamah berusaha membuat ialah mentafsirkannya mengikut tujuan dan niat Parlimen. Tetapi, mahkamah tidak boleh menanya Parlimen apa niatnya. Mahkamah hendaklah memutuskan soalan itu sendiri dari perkataan-perkataan yang digunakan oleh Parlimen.

(2) Atas prinsip am, apabila suatu statut mengawalselia penggunaan suatu hak atau kuasa atau penggunaan prosedur yang ditetapkan, dengan rujukan yang nyata kepada masa, terdapat kecenderungan yang nyata pada pihak mahkamah untuk menganggap peruntukan yang relevan itu sebagai suatu peruntukkan yang seharusnya diikuti dengan tegas dan amat teliti.

(3) Apabila mencari tujuan Parlimen, mahkamah hendaklah mencari keseimbangan diantara risiko kemudaratan yang disebabkan oleh sebarang kelengahan dan risiko bahawa suatu siasatan yang wajar ke dalam aduan itu tidak akan dicapai jika perlantikan jawatankuasa tatatertib itu didapati batal dan tidak sah. Adalah dihujahkan bahawa hal pertama adalah yang lebih buruk. Oleh itu di dalam kes ini, had masa yang dikenakan oleh ss 98 dan 99 Akta itu adalah mandatori dan ketidakpatuhan had masa itu menjadikan

A prosiding di bawah Akta itu, termasuk perlantikan jawatankuasa tatatertib itu, menyalahi undang-undang, tidak sah dan tidak berkesan.]

Notes

B For cases on professional discipline in the legal profession, see 9 *Mallal's Digest* (4th Ed) paras 1411–1493.

Cases referred to

1 *Montreal Street Railway Co v Normandin* [1917] AC 170 (refd)
2 *Plastic Enterprises Pty Ltd v The Southern Cross Assurance Co Ltd* C [1968] Qd R 401 (refd)
3 *Cheatley v The Queen* (1972) 127 CLR 291 (refd)
4 *AG (Canada) v Hallett & Carey Ltd* [1952] AC 427 (refd)
5 *Bank of New Zealand v Cermac Modular Industries Ltd* [1972] NZLR 661 (refd)
6 *Farrell v Alexander* [1977] AC 59 (refd) D
7 *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 (refd)
8 *Ex p Tasker, re Hamman* [1971] 1 NSWLR 804 (refd)
9 *Vandyke v Vandyke* (1976) 12 ALR 621 (refd)
10 *Graham v AA-G* [1966] NZLR 937 (refd)
11 *Howard v Baddington* (1877) 2 PD 203 (refd)
E 12 *Punjab Co-operative Bank Ltd, Amristar v CIT Lahore* (1940) PC 230 (refd)
13 *Sheffield City Council v Grangers Wines Ltd* [1977] 1 WLR 1119 (refd)
14 *Barker v Palmer* (1881) 8 QBD 9 (refd)
F 15 *Transport Amalgamated Pty Ltd v AAA Transport Service Pty Ltd* (1975) 11 SASR 255 (refd)
16 *R v Police Appeal Board, ex p McGee* (1984) 36 SASR 455 (refd)
17 *Arthur Yates & Co Ltd v Ministry of Agriculture and Fisheries* [1979] 1 NZLR 469 (refd)

G **Legislation referred to**

Legal Profession Act 1976 ss 95, 96, 98 & 99

Appeal from: Originating Summons No 17–9–1989 (High Court, Kuala Lumpur)

H *Cecil Abraham* (*Shearn Delamore & Co*) and *Maizura Mohamed* (*Drew & Napier*) for the appellant.

Bastian Vendargon and *Anthony M Sebastian* (*Vendargon & Partners*) for the respondent.

I *Cur Adv Vult*

Edgar Joseph Jr SCJ (delivering the judgment of the court): This appeal revolves around the question whether the provisions as to time as set forth

in ss 98 and 99 of the Legal Profession Act 1976 ('the Act') in the form that it took prior to its amendment by the Legal Profession (Amendment) Act 1992, being Act A 812, which came into force on 1 April 1992 by virtue of Legal Notification 117 dated 9 March 1992, are mandatory or directory. A

In this judgment all references to section shall, unless the context otherwise requires, be to the Act.

Upon an application by originating summons taken out by the plaintiff, Encik Joseph Au Kong Weng, an advocate and solicitor, against whom a complaint by the then secretary to the Bar Council, under s 95(1) of the Act had been made, alleging misuse of his firm's trust account, citing the Bar Council, states of Malaya, and the members of a disciplinary committee appointed by the Chief Justice under s 99, consequent thereto, namely Messrs Harbans Singh Bhal, Lee Kwong Wah and Dato' Mohd Amin bin Mohd Daud, as the first, second, third and fourth defendants, respectively, Eusoff Chin J (as he then was) decided that the provisions as to time were mandatory, and that consequently, on the facts before him the appointment of the disciplinary committee was invalid, null and void, and from that decision the defendants have appealed to this court. B C D

We were told at the outset of this appeal that the question arising for decision on this appeal is of great importance to the public and to the legal profession, as our decision would affect a very large number of complaints now pending under the Act, one way or another. E

To put matters in their correct perspective, it is first of all, necessary to refer to the procedure prescribed by the Act which govern complaints under it; so far as material to the present appeal, it is as follows:

A complaint may be made against an advocate and solicitor, a pupil or an article clerk and must be made to the Bar Council (s 95).

The Bar Council must refer every complaint to the relevant state bar committee for investigation (s 95(3)). F

The state bar committee to whom the complaint has been referred must then investigate the complaint regardless of its merits (s 96(1)). In doing so, it is required to:

(a) prepare a written statement stating out the substance of the complaint; G
(b) give notice to the advocate and solicitor concerned of not less than 14 days—
    (i) to furnish a written explanation; and
    (ii) to advise the state bar committee if he wishes to be heard by them;
(c) give the advocate and solicitor concerned a 'reasonable opportunity' to be heard. H

The state bar committee is allowed the space of three months to fulfill its duties under the Act (s 96(2)).

At this point we would interject to refer to the practical problems which confront the state bar committee in fulfilling its duties under the Act; they are set forth in an affidavit dated 23 October 1990 affirmed by Dato' Peter Mooney, the chairman of the complaints committee, of the Bar Council and are as follows: I

7 State bar committees are composed of members of the Bar who, like members of the Council, are all volunteers, are prepared to give time and effort without reward to the service of the Bar and the public. They normally meet once a month. Any complaint arriving from the Bar Council has to wait the first meeting thereafter and accordingly:

(1) there may be an interval of up to a month before the state bar committee sees the complaint;
(2) thereafter, it has to decide whether the complainant is likely to be frivolous or vexatious. If it is, then the committee has to write to the complainant for a deposit and await this before taking the next step;
(3) it then has to prepare a written statement setting out the substance of the complaint. This may not be a simple task since there may be many document submitted by a complainant and the complaint itself may be lengthy and badly expressed;
(4) the respondent has to be given at least 14 days notice. Not infrequently the subject matter of the complaint is an event which has its origins several years back. The respondent may not reply to the first letter from the committee and may need a reminder. He frequently writes and asks for time to look at all papers and study them before answering. This request can hardly be refused;
(5) his answer when submitted has to await the next meeting of the committee. This could be the second monthly meeting after the receipt of the complaints by the committee but it might well be the third;
(6) the respondent is entitled to be heard by the committee and this takes the matter up to the third or quite possibly the fourth monthly meeting of the committee after the receipt of the complaint;
(7) the committee has to deliberate on all the written and oral material and has to prepare a report and submit it to the Council; and
(8) the committee is allowed the space of three months for all this.

To revert to the provisions as to procedure governing complaints under the Act; in the event of the state bar committee failing to fulfill its duties under the Act within the three month time limit provided for in the Act, the Bar Council must refer the complaint to the inquiry committee (s 96(2)) who are required to forthwith investigate the complaint and to report thereon, with its recommendations, within the same time limit as that provided for in the Act for the state bar committee (s 97(1)).

Again we interject, to refer to the practical problems which confront the inquiry committee in fulfilling its duties under the Act; they are set forth in the affidavit of Dato' Peter Mooney and are as follows:

9 ...The inquiry committee has to start all over again and is subject to the same time limits as the state bar committee with the additional difficulty that it meets in Kuala Lumpur and does not have the advantage of being in the state where the advocate and solicitor is practising and where, in most cases, the complaint resides or has his place of business.

10 When the council receives a report from the state bar committee or inquiry committee, it may well be out of time. If the provision as to time is mandatory, then there is no point in the council considering the complaint any further. This would mean the frustration of many complaints. The council has always viewed the provisions as to time as directory and has gone on to deal with them despite the contravention of the time limit.

Reverting once again to the provisions as to procedure governing complaints under the Act, in the event of the Bar Council receiving a report from the state bar committee or the inquiry committee, the Bar Council must, within six weeks from the date of such receipt, determine whether a formal enquiry by a disciplinary committee is necessary (s 98(a)), and if it determines that it is necesary, it must forthwith apply to the Chief Justice to appoint a disciplinary committee to conduct a formal inquiry within 14 days after receiving an application from the Bar Council (s 98(b)). A disciplinary committee consists of three advocates and solicitors of seven years' standing, and having valid practising certificates. The Chief Justice shall within 14 days of an application made by the Bar Council appoint the disciplinary committee (s 99(1)) and he has the discretion under s 99(3) of the Act to revoke the appointment, or remove any member of a disciplinary committee, or fill any vacancy in a disciplinary committee.

Commenting on this stage of the proceedings, in particular the practical problems which confront the Bar Council, Dato' Peter Mooney in his affidavit has this to say:

> 11 The council is given six weeks to determine whether a formal inquiry by a disciplinary committee is necessary. This looks like an adequate time. In practice, it is not so. There are 34 members of the council. It is impossible for all 34 members to examine the complaints, either collectively or individually. By the time the report is submitted to the council, it is the last paper in what is likely to be a bulky file containing the original written complaint, copies of all documents relating to the complaint, the written answer of the respondent and any copy documents which he had submitted, further answer by the complaint, further answers by the respondent and the report and recommendation of the state bar committee. In order to deal with these files, the council had delegated its functions regarding complaints to the complaints committee. This consists of twelve members and meets once a month. In view of the volume of complaints and the bulk of the files it is not possible for all twelve members to study every file and the procedure is that each file is individually studied by three members and is reported to the committee at its monthly meeting. These three members may be in different parts of the country. On receipts of their report, the council secretariat will send it to an individual member. He studies it and sends it direct or passes it back to the secretariat to be sent to the next member and similarly to the third member. The minium time involved in this is three weeks and it is to the next meeting of the committee which may be nearly a monthly away in which case inevitably the time limit is exceeded. Moreover, a difficult case where there is disagreement within the complaints committee may be referred to the council and inevitably the time limit is exceeded.

Reverting yet again to the provisions as to procedure governing complaints under the Act, in the event of a disciplinary committee appointed by the Chief Justice not being able to complete its inquiry into a complaint against an advocate and solicitor in his professional capacity, and to file the order it has made in respect of the inquiry, with the Bar Council and the registrar of the High Court within three months from the date it was appointed, the Chief Justice is empowered, upon application being made to him by the disciplinary committee, to extend the period of three months under s 101(3) of the Act.

A The chronology of events relevent to this appeal is undisputed and may be stated thuswise:

The honorary secretary of the Bar Council, had made a complaint dated 6 June 1987 under the Act against the respondent advocate and solicitor and his partner, Encik Malik, with respect to mismanagement of their firm B Messrs Malek & Joseph Au's trust account.

On 3 July 1987, the Bar Council referred this complaint to the state bar committee, Pahang.

On 3 September 1987, the state bar committee, Pahang had forwarded its report and recommendation to the Bar Council.

On 26 October 1987, the Bar Council had applied to the Chief Justice C of Malaya, for the appointment of a disciplinary committee to investigate the complaint. But, regard being had to the provisions of s 98 of the Act, it had only six weeks from the date of the receipt of the report and recommendation of the state bar committee, Pahang to apply to the Chief Justice for the appointment of a disciplinary committee, so that its last day D for doing so was 15 September 1987. In other words, it was out of time by some 12 days.

Before us, counsel for the appellants repeated his submission in the court below that the time limits imposed by ss 98 and 99 of the Act were not mandatory but directory. He pointed out that these sections were purely procedural, that once a complainant had lodged a complaint he had no E control over the steps which followed under the Act, and so Parliament could not have intended that the time limits imposed by these sections were to be mandatory.

In support, the Privy Council case of *Montreal Street Railway Co v Normandin*[1] was cited. In that case, the fact that the proper procedure had F not been followed with respect to the revision of jury lists was held not to affect the validity of verdicts given by juries selected from those lists. In particular, our attention was directed to the following passage in the judgment of Sir Arthur Channel when drawing the distinction between discretionary and compulsory powers:

G > The question whether the provisions in a statute ... are directory or imperative has frequently arisen in this country, but it has been said that no general rule can be laid down and that in every case the object of the statute must be looked at ... When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in respect of this duty would work serious general inconvenience or injustice to persons who have no control H over those entrusted with the duty, and at the same time we would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of acts done.

Finally, he urged that the court would need to strike a balance between the I risk of prejudice caused by any delay and the risk that a proper inquiry into a complaint will not be attained if the appointment of the disciplinary committee is held to be null and void.

On the other hand, counsel for the respondent advocate and solicitor suggested that in considering whether the time limits imposed by ss 98 and

99, were mandatory or directory, the court had to consider what was the purpose of Parliament in imposing the time limits concerned. In answering this question, he said, that it was important to recognize that in disciplinary proceedings under Pt VI of the Act three interests were at stake, namely, the interest of the complainant, the interest of the advocate and solicitor concerned and the interest of the public. The scheme of the Act, he urged, was such as to ensure that complaints were dealt with speedily as this would serve the interests of all three parties. On this view, he submitted, the time limits concerned should be held to be mandatory. Other factors which he said went to support this conclusion were that in imposing the time limits, ss 98 and 99 used the word 'shall', that the penalties which the disciplinary committee could impose included the penalties of striking off and suspension, and these were penal in nature. He sought to distinguish the *Montreal Street Railway Co* case,[1] on the ground that there, rights or benefits were at stake whereas here, it was the livelihood of a professional man which was at stake.

We note that in the *Montreal Street Railway Co* case,[1] the facts were that the respondent, in an action against the appellants for damages for personal injuries, had obtained a verdict of a jury in the Superior Court in Quebec for $12,000 for which sum judgment was entered. The appellants subsequently ascertained that the revising board for the district had not revised the lists of the jurors under Art 3426 of the Revised Statutes of Quebec 1909 for several years and, principally, on that ground, they sought to impugn the verdict of the jury.

The attempt in the courts below, however, failed and when the matter finally reached the Privy Council, their Lordships noted that although the jury list concerned was an old one, the men on it had all been qualified and probably in most cases remained so. The names were taken in proper rotation and those ultimately sworn appear all to have qualified. The Privy Council also observed that: 'It does far less harm to allow cases tried by a jury formed as this one was, with the opportunities there would be to object to any unqualified man called into the box to stand good, than to hold the proceedings null and void.'

We also note that in dismissing the appeal their Lordships were swayed by the view taken by the trial judge Monet J that he ought not to interfere where the appellants had shown no prejudice; their Lordships thought this view was reasonable and also in accordance with the authorities.

It is not difficult to cite an anthology of cases affording guidance as to when a statutory provision is mandatory or directory, but, as rightly pointed out by the court, in *Plastic Enterprises Pty Ltd v The Southern Cross Assurance Co Ltd*[2] at p 404: 'The cases ... are confusing and to some extent apparently inconsistent.'

However, one thing is clear and that is that in construing a statutory provision what the court endeavours to do is to construe it according to the object and intent of Parliament. So, for example, in *Cheatley v The Queen*,[3] Barwick CJ said at p 296: 'In construing the section we are seeking the intention of Parliament' and, in *AG (Canada) v Hallett & Carey Ltd*,[4] Lord Radcliffe said at p 449: '... every statute is to expounded according to its manifest and express intention'. This has been aptly described as 'the paramount rule of construction'. (See *Bank of New Zealand v Cermac Modular Industries Ltd*[5] per North P (NZCA) at p 670.)

But, at the risk of being trite, we would add that the courts cannot ask Parliament what its intention was; they will have to decide that question for themselves from the words Parliament has used. This point was well made by Lord Simon of Glaisdale when he said in *Farrell v Alexander*[6] at p 81: '... in the construction of all written instruments including statutes, what the court is concerned to ascertain is, not what the promulgators of the instrument meant to say, but the meaning of what they have said. It is in this sense that the "intention" is used as a term of art in the construction of documents.'

And, in *Stock v Frank Jones (Tipton) Ltd*,[7] the same judge had this to say:

> The final task of construction is still, as always, to ascertain the meaning of what the draftsman has said, rather than to ascertain what the draftsman meant to say. But if the draftsmanship is correct these should coincide.

To return to the question which arises for decision in this appeal: are the provisions as to time as set forth in ss 98 and 99 of the Act, mandatory or directory? We would say that the answer to this question depends upon the Act as a whole (see *Ex p Tasker re Hamman*[8] at pp 808–809, per Herron CJ (NSW CA)), and the legislative intention viewed from the context of the particular provision (*Vandyke v Vandyke*[9] per Mahoney JA (NSW CA)) the importance of the provision and the consequences of non-compliance with it (*Graham v AA-G*[10]).

An often quoted principle which affords useful guidance to us is to be found in the judgment of Lord Penzance in *Howard v Baddington*[11] and is as follows:

> There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the court to be of that material importance to the subject matter to which they refer, as that the legislature could have intended that non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end. Now the question is, to which category does the provision in question in this case belong?

We must make a further general observation and that is, as pointed out by Viscount Maugham in *Punjab Co-operative Bank Ltd, Amristar v CIT Lahore*:[12] 'It is a well settled general rule that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed substantially.'

It is with the above principles in mind, and, of course, not forgetting the submissions of counsel and the affidavit evidence to which we have referred, that we must now embark upon a fuller consideration of the issue which arises for decision.

The sections with which we are directly concerned are ss 98 and 99 and they provide as follows:

> 98 Decision of Bar Council on reports.
> The Bar Council shall, within six weeks of being furnished with the report mentioned in section 96 or section 97 —

(a) determine whether a formal inquiry into the complaint by a Disciplinary Committee is necessary;
(b) if it determines a formal inquiry to be necessary, forthwith apply to the Chief Justice to appoint a Disciplinary Committee to conduct the formal inquiry; and
(c) notify in writing the advocate and solicitor and the person by whom the complaint was made or the information referred, of the findings of the Inquiry Committee or of the Bar Committee, as the case may be, and of the determination of the Bar Council made under paragraph (a).

99 Chief Justice to appoint Disciplinary Committee:

(1) The Chief Justice shall within fourteen days of an application made by the Bar council in that behalf appoint a committee to be known for the purpose of this Act as a 'Disciplinary Committee', from among advocate and solicitors of not less than seven years' standing and having valid practising certificates:

Provided that no advocate and solicitor who is a member of the Inquiry Committee or has been involved in the inquiry or investigation of the complaint which has led to the making of the aforesaid application shall be appointed.

(2) A Disciplinary Committee shall consist of three members:

Provided that its proceedings shall not be invalidated by any vacancy in its membership so long as its members are not less than two.

(3) The Chief Justice may at any time revoke the appointment of or remove any member of a disciplinary committee or fill any vacancy in a Disciplinary Committee.
(4) Every Disciplinary Committee shall appoint and advocate and solicitor to be the secretary of that Disciplinary Committee.
(5) The production of any written instrument purporting to be signed by the Chief Justice and making the appointment, revocation or removal referred to in this section shall be evidence that the revocation or removal has been duly made.

It appears to us that a reading of the timetable provided under ss 93–103 with regard to disciplinary proceedings under Pt V of the Act, the expeditious disposal of complaints is what is sought to be enforced by the Act in providing for safeguards against delay, in order to ensure that an innocent advocate and solicitor, clears himself of any stain or suspicion of misconduct as soon as possible or conversely, that a guilty advocate and solicitor, is dealt with, as soon as possible, in the public interest. The very object of expeditious disposal of complaints under the Act would be defeated if the steps to be taken consequent thereto could be treated casually and lightly. This is the first impression we get on reading the provisions concerned and we are thus reminded of the well known dictum of Denning MR in *Sheffield City Council v Grangers Wines Ltd*[13] at p 1122 that whether a particular provision is to be treated as mandatory (or imperative) or directory 'is always a matter of impression'.

But, we consider that the matter must be explored further.

At first glance, we confess that we were somewhat impressed with counsel for the appellant's submission, based on the Privy Council case of *Montreal Street Railway Co*,[1] but on reflection we consider that it is readily

distinguishable, for there, unlike here, no provision as to time was in issue. This is an important distinguishing feature because provisions as to time are always mandatory unless the court is given a power to extend the relevant time limit.

On general principle, where a statute regulates the exercise of a right or power, or the use of a prescribed procedure, express reference to time being made, there is a marked inclination on the part of the court to regard the relevant provision as one which must be strictly and meticulously followed out. So, for example, in *Barker v Palmer*[14] at pp 10–11, Grove J said:

> In construing Acts of Parliament, provisions which appear on the face of them obligatory, cannot, without strong reason given, be held only directory. The rule is, that provisions with respect to time are always obligatory unless a power of extending the time is given to the court, and there is no such power here. In the present case the latter part of r 7 was complied with, but not the former. It is to be observed that the word 'shall' is used with respect both to the time of delivery to the bailiff and of the service on the defendant. A reason is suggested for holding the rule to be directory merely in the one case and obligatory in the other; it is said that the period of 40 days is fixed only in order to allow the bailiff a reasonable time to serve the summons, whilst the period of 35 days is fixed for the protection of the defendant. It is also said that the bailiff has in fact served the summons within the proper period, and therefore has waived compliance with the rule. It is impossible for the court to speculate upon the reasons for legislation in the way suggested, or to dissect the Act of Parliament and say upon those reasons that part of an enactment is directory and part obligatory. The reasons suggested might be wholly wrong, and to act upon them here would be practically to abrogate the rule. The words of the rule are pre-emptory, and give no more discretion with respect to the delivery of the bailiff, than with respect to the service of the summons. (Lopes J agreed.)

The principle enunciated by Grove J in *Barker v Palmer*[14] was followed by Levan J in *Transport Amalgamated Pty Ltd v AAA Transport Service Pty Ltd,*[15] a case where liquidators had purported to reject a proof of debt after the expiration of the time limited by statutory provisions, and it was held that they could not do so. Levan J at pp 102–103 said this:

> It appears to be well settled that in construing Acts of Parliament and presumably rules and regulations made thereunder provisions which on their face appear obligatory cannot without strong reasons being shown be held to be merely directory. The rule is that provisions with respect to time are always obligatory unless a power of extending time is given to the court: *Barker v Palmer* (1881) 8 QBD 9.

Similarly, the principle enunciated by Grove J in *Barker v Palmer*[14] was followed by Zelling J in the *R v Police Appeal Board, ex p McGee,*[16] where it was held that the provisions as of s 45(1) of the Police Regulation Act 1952–1981, provided for the time within which an appeal shall be instituted to the police appeal board, were held to be mandatory.

The following passage in *Craies on Statute Law* (7th Ed) at p 266, under the heading: 'Statutes giving jurisdiction to courts are usually absolute' is to the like effect:

> As a general rule, statutes which enable persons to take legal proceedings under certain specified circumstances must be accurately obeyed notwithstanding the

> fact that their provisions may be expressed in merely affirmative language. Thus, under s 2 of the Summary Jurisdiction Act 1857, after the hearing by a justice of the peace of any summary information, either party could, if dissatisfied ... apply in writing within three days ... to the said justice to state and sign a case setting forth the facts. In *Edwards v Roberts* [1891] 1 QB 302 the appellant neglected to get the case stated within the three days prescribed, and it was held, in consequence, that the court had no jurisdiction to hear the appeal. This rule may also be expressed thus — that when a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with.

More particularly, ss 93–103 of the Act present a picture of a code of procedure in which time is given a place of paramount importance. This is emphasized by s 101(3) by the contrast it displays when compared with ss 96, 98 and 99 in which time is mentioned. We say so because *whereas* s 101(3) confers upon the Chief Justice a discretion to extend the period of three months within which a disciplinary committee must complete its inquiry into a complaint against an advocate and solicitor and file the order it has made in respect of the inquiry with the Bar Council and the registrar of the High Court, no power to extend time is given with regard to the time limits laid down by ss 96, 98 and 99. This, in our view, is a clear indication by the legislature that time is of the essence with regard to the various steps in considering the complaint against an advocate and solicitor prescribed by ss 96, 98 and 99 except the step prescribed by s 101(3) when time may be extended.

In the present appeal, we have reminded ourselves of counsel for the appellant's submission that in seeking Parliament's intention, the court will have to strike a balance between the risk of prejudice caused by any delay and the risk that a proper inquiry into a complaint will not be attained if the appointment of the disciplinary committee is held to be null and void. It was submitted that the former was the greater evil.

In our view, if those considerations were allowed to determine the meaning of the provisions as to time laid down in ss 98 and 99, two different results could be achieved depending on whether the person interpreting the provisions is more sympathetic to the position of an advocate and solicitor than the position of a complainant or vice versa, in the objective and general sense. Such an approach overlooks the point of fundamental importance, which must never be overlooked and that is: 'The final task of construction is still, as always, to ascertain the meaning of what the draftsman has said rather than to ascertain what the draftsman meant to say' (per Lord Simon of Glaisdale in *Stock v Frank Jones (Tipton) Ltd*[1] at p 236) and that:

> ... dislike of the effect of a statute has never been accepted reason for departing from its plain language. Holt CJ said nearly three centuries ago '... an Act of Parliament can do no wrong, though it may do several things that look pretty odd ... (See *City of London v Wood* (1701) 88 ER 1592 at p 1602) ... Accordingly, even if one regarded the policy implicit in (the Act concerned) as open to criticism, (if) the statutory language is clear beyond doubt, (it) must prevail.' (See *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 per Lord Edmund-Davies at p 238.)

A It is axiomatic that intention is an unruly horse to ride, and the warning must be constantly kept in the forefront of our minds that: 'English law prefers certainty of interpretation, based on what Parliament has said, to the uncertain approach which prevails in the United States of America, based on one judge's feeling as to what Parliament meant.' (See *Arthur Yates & Co Ltd v Ministry of Agriculture and Fisheries* at p 472.) We, too, B prefer certainty of interpretation based on what parliament has said.

For the reasons stated, we would answer the question posed at the outset of this judgment by saying that the time limits imposed by ss 98 and 99 of the Act are mandatory, and that the non-compliance with these time limits rendered the proceedings under the Act against the respondent, including C the appointment of the disciplinary committee, incurably illegal, void and of no effect.

Accordingly, the appeal is dismissed with costs. Deposit to respondent to account of taxed costs.

D *Appeal dismissed.*

Reported by Prof Ahmad Ibrahim

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